STATE OF MICHIGAN
IN THE SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS
Holbrook, Jr., P.J.; Saad, JJ., Talbot, JJ.

DANIEL ADAIR, a Taxpayer of the FITZGERALD PUBLIC SCHOOLS; and FITZGERALD PUBLIC SCHOOLS, a Michigan municipal corporation, et al,

Plaintiffs-Appellants,

v

STATE OF MICHIGAN, DEPARTMENT OF EDUCATION; DEPARTMENT OF MANAGEMENT AND BUDGET; and MARK A. MURRAY, TREASURER OF THE STATE OF MICHIGAN,

Defendants-Appellees.

Supreme Court No.:121536
Court of Appeals Case No.: 230858

REPLY BRIEF ON APPEAL – APPELLANTS

ORAL ARGUMENT REQUESTED

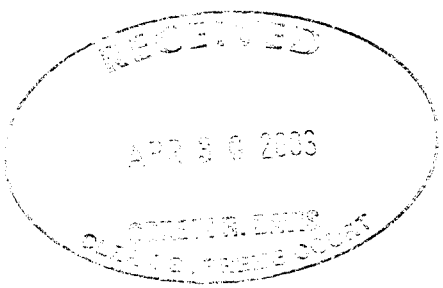

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TABLE OF CONTENTS

Page

INDEX OF AUTHORITIES

Page(s)

Cases – Michigan

Constitution – Michigan

Statutes – Michigan

INDEX OF AUTHORITIES
(Continued)

Page(s)

Miscellaneous

REPLY BRIEF ON APPEAL – APPELLANTS

The plaintiffs-appellants (hereinafter "plaintiff-taxpayers") offer this Reply Brief in support of their position in this matter, pursuant to Michigan Supreme Court practice and MCR 7.212(G).

STATEMENT OF FACTS AND PROCEEDINGS

The pertinent facts and proceedings in this matter were fully set forth in plaintiff-taxpayers' previously filed brief on appeal and will not be repeated herein.

ARGUMENT

I. PLAINTIFF-TAXPAYERS DO NOT CONTEST THE STATE'S AUTHORITY TO ENACT THE STATUTORY PROVISIONS OR PROMULGATE THE ADMINISTRATIVE RULES CURRENTLY AT ISSUE. RATHER, THEY CHALLENGE THE STATE'S FAILURE TO FULLY FUND THE MANDATED ACTIVITIES AND SERVICES OCCASIONED BY THESE STATUTES AND ADMINISTRATIVE RULES, AS REQUIRED BY CONST 1963, ART 9, § 29.

In its recently filed brief on appeal, the State mischaracterizes the nature of plaintiff-taxpayers' suit in the instant matter, arguing that plaintiff-taxpayers are challenging the enactment of certain statutory provisions and administrative rules that were promulgated in 1987 and 1993. In making its argument, the State chooses to ignore the specific allegations of plaintiff-taxpayers' second amended complaint, which recite that the suit is brought to remedy the underfunding that is presently occurring pursuant to § 29 of the Headlee Amendment. Plaintiff-taxpayers seek a declaratory ruling that the State's failure to fully fund the mandated activities and services is violative of the second sentence of Const 1963, art 9, § 29. Based on the state's erroneous initial premise, which focuses on the year of the enactment of the mandate rather than when the failure to fund is occurring, the State argues that plaintiff-taxpayers' instant suit is barred by laches, or is encompassed by the judgments entered in *Durant v State of Michigan*, 456 Mich 175; 566 NW2d 272 (1997).

In order to properly relate the argument, it is necessary to briefly discuss the manifest purpose of this section of the Headlee Amendment. In *Durant v State of Michigan*, 456 Mich 175; 566 NW2d 272 (1997), this Court said:

> The Headlee Amendment imposes on state and local government a fairly complex system of revenue and tax limits. These are summarized in art 9, § 25 and implemented in the following sections. There are three main elements. . . .
>
> The third element of the Headlee system is summarized in art 9, § 25, which states, in part, "The state is prohibited from requiring any new or expanded activities by local governments without full state financing, from reducing the proportion of state spending in the form of aid to local governments, or from shifting the tax burden to local government". These requirements are implemented in §§ 29 and 30.

Similarly, in *Schmidt v State of Michigan*, 441 Mich 236, 252; 490 NW2d 584, 591 (1992), the Court stated:

> When the voters ratified the Headlee Amendment, they sought to ensure that when the state mandates a program, funds are provided to the local government to pay for that program.

Thus, the singular purpose of an action under article 9, § 29 is to contest the State's *failure to fund* the activities or services that are required to be provided by local units of government. It is not, by any means, to prohibit or limit state government from imposing requirements or mandates on local units of government.

Indeed, under this section of the Amendment, the options rest with state government. The State can choose not to mandate that certain activities or services be provided by local units of government, or limit or restrict that which is mandated. Alternatively, the State can choose to require services by local units of government. In the latter scenario, however, article 9, § 29 imposes a corresponding funding obligation.

In other words, state government has full control over its own funding obligation under the Headlee Amendment scheme. However, what it cannot do within that scheme is require that activities and services be provided by local units of government and then refuse to fund those activities and services. Again, the focal point of the Headlee Amendment scheme is the duty placed on the State to fund those activities and services that it mandates.

In the instant action, plaintiff-taxpayers do not challenge the imposition of mandates upon Michigan school districts, but, rather, seek a declaratory ruling that the State has failed to provide the funding to pay for those mandates, as required by article 9, § 29. This is precisely the form of relief that this Court has indicated is to be pursued by a taxpayer who alleges a violation of Const 1963, art 9, § 29. *Durant v State of Michigan*, 456 Mich 175, 205; 566 NW2d 272, 285 (1997).

The second sentence of Const 1963 art 9, § 29, pursuant to which this suit is brought, provides as follows:

> A new activity or service or an increase in the level of any activity or service beyond that required by existing law shall not be required by the legislature of any state agency of units of Local Government, unless a state appropriation is made and disbursed to pay the unit of Local Government for any necessary increased costs . . .

A taxpayer bringing an action pursuant to this provision must establish the following elements:

1. The particular activity or service at issue *was not mandated* by state law when the Headlee Amendment was adopted, or, if it was mandated at that time, it *was not mandated at the level of activity or service currently required.*

2. Subsequent to the adoption of the Headlee Amendment, the State newly mandated the activity or service or mandated an increase in the level of the activity or service above that required in December of 1978.

3. The State is not providing funding to local units of government for the necessary costs incurred in connection with providing the newly mandated activity or service or the increased level of the activity or service.

State funding for public school districts in Michigan is allocated and distributed pursuant to the School Aid Act, MCL 388.1601 *et seq.*, as amended annually. At issue in this proceeding, brought pursuant to the second sentence of Const 1963, art 9, § 29, is a request for prospective, declaratory relief concerning the alleged lack of current state funding for certain mandated activities and services.

In *Schmidt v State of Michigan*, 441 Mich 236, 250; 490 NW2d 584 (1992), this Court established the manner of proceeding on a claim alleging a violation of the analogous first sentence of article 9, § 29:

> This approach requires an initial calculation of the proportion of statewide funding for a particular mandated activity to the total necessary costs of providing that activity. The necessary costs to each local unit in the funding year at issue are then calculated. Next, the proportion of state financed funding for the activity or service in the base year is compared to the proportion of funding provided to the district in the year at issue. The state is obligated to afford each unit providing the activity or service the same proportion of funding that the state provided on a statewide basis in the year that the Headlee Amendment was ratified.

In a proceeding under the second sentence of article 9, § 29, the initial consideration is whether the activity or service for which funding is at issue was required as of December 22, 1978; the effective date of the Headlee Amendment. This is the equivalent of the "base year" determination in a proceeding involving the first sentence of article 9, § 29. The "funding years" in both actions brought under the first and second sentences of article 9, § 29, are any years subsequent to December 22, 1978 in which the constitutionally required state funding has not been provided for the mandated activities or services. Contrary to the State's assertion, it is submitted that the date on which the particular activity or service was *first* mandated is irrelevant for purposes of the second sentence of § 29 of the Headlee Act, as long as it was mandated after December 22, 1978.

In the instant case, it is undisputed that all of the activities and services enumerated in plaintiff-taxpayers' second amended complaint, for which it is alleged the State was required to provide funding pursuant to the second sentence of article 9, § 29, were established through statutory enactments, administrative rules or executive orders promulgated after December 22, 1978. In the instant action, brought pursuant to the second sentence of article 9, § 29, plaintiff-taxpayers have alleged that the State has failed to provide funding for these mandated activities or services in the "funding years", or "payout years", at issue. This is not an action to challenge the State's authority to enact legislation, promulgate administrative rules or issue executive orders establishing the subject mandates. Rather, it is a request to the Court of Appeals, pursuant to Const 1963, art 9, § 32, for a declaratory ruling as to the existence of underfunding for the necessary cost of providing those activities and services as of the present point-in-time.

One further comment is in order in this regard. In its recent brief, the State mentions several times that plaintiff-taxpayers' second amended complaint does not expressly reference 2000 PA 297, the calendar year 2000 *amendment* to the School Aid Act. The State's purpose in so noting is unclear. If the contention is that the State was unaware that plaintiff-taxpayers were challenging the School Aid Act amendment applicable at the time of filing the complaint, the contention is not well taken. During the proceedings below, plaintiff-taxpayers filed their *initial* brief in support of their complaint. The brief provided, in pertinent part:

> "State law", as the term is used in §29, has been construed by the Supreme Court in *Durant, supra*, to include state statutes and state agency rules. The plaintiffs contend, and are prepared to establish, that the State School Aid Act of 1979, 388.1601, *et seq*, as amended, is violative of § 29 insofar as the defendant-state has failed to appropriate and disburse revenues to local and intermediate school districts in Michigan which are sufficient to pay for the necessary increased costs of activities and services which are newly required (*i.e.,* required after 1978) or which represent an increase in the level

of activities and services required of local units of government in 1978.

Plaintiffs' Brief in Support of
Complaint dated November 15, 2000,
pp. 3-4

Moreover, as discussed above, the whole nature of an action under the second sentence of Const 1963, art 9, § 29 concerns an alleged lack of funding in the "funding year" or "payout year". State funding for public school districts is provided under the School Aid Act; an Act which, in the usual course, is amended each year. It is submitted that plaintiff-taxpayers' second amended complaint necessarily implicates 2000 PA 297, the amendment to the School Aid Act in effect when the second amended complaint was filed, with or without the specific reference to 2000 PA 297.[1]

II. PLAINTIFF-TAXPAYERS' CLAIMS CONCERNING THE SECOND SENTENCE OF CONST 1963, ART 9, § 29 DO NOT ARISE FROM THE "SAME TRANSACTION" AS THOSE AT ISSUE IN THE *DURANT I* PROCEEDINGS.

In its recently filed brief, the State argues that Michigan has adopted a "broad approach" to the application of *res judicata.* The State then asserts that given this broad approach, the doctrine applies in a subsequent action between the same parties, not only to points upon which the previous court was actually called upon to form an opinion and pronounce a judgment, "but to every point which properly belonged to the subject of litigation" and which the parties, exercising reasonable diligence, "might have brought forward at the time". Appellees' Brief on Appeal, p. 10 (quoting *Pierson Sand and Gravel, Inc. v Keeler Brass Co,* 460 Mich 372, 381; 596 NW2d 153 (1999)). Curiously, the State does not reference the most recent pronouncement on the issue from this Court

[1] There has been an amendment to the School Aid Act adopted subsequent to the filing of the present suit, 2001 PA 121 (Imd. Eff. Sept 28, 2001). This amendment has left unchanged the funding structure for Michigan school districts; the amendment simply altering the amount of funding provided under that funding structure. As such, the provisions of this most recent amendment have not impacted the plaintiff-taxpayers' claims of unconstitutional underfunding, as pled in their second amended complaint now before this Court.

in *Baraga County v State Tax Commission*, 466 Mich 264; 645 NW2d 13 (2002), where the Court said:

> There are three prerequisites to the application of the doctrine of *res judicata:* "a prior decision on the merits; *the issues must have been resolved in the first case* . . . ; and both actions must be between the same parties or their privies." (emphasis added) (cit omitted)

Perhaps even more important, whether or not a "broad approach" to the application of *res judicata* is followed, the most critical element, and one which the State does not even mention, is whether the essential facts of the two actions are the same. In *Dart v Dart*, 460 Mich 473, 586; 597 NW2d 82 (1999), this Court said in this regard:

> *Res judicata* bars a subsequent action between the same parties when the evidence or essential facts are identical.

Indeed, the Restatement of the Law - Judgments, 2d § 24, p. 196, includes the following:

> (2) What factual grouping constitutes a "transaction", and what groupings constitute a "series", are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.

Here there is no dispute, nor could there be, that claims under the first and second sentences of article 9, § 29 are mutually exclusive. As discussed in detail in plaintiff-taxpayers' previously filed brief on appeal, the difference in proofs required to establish claims under the first and second sentences of § 29 relates to the fundamentally different purposes sought to be achieved between the two sentences. This Court explicitly recognized those disparate purposes in *Judicial Attorneys Association v State of Michigan*, 460 Mich 590, 597-98; 597 NW2d 113 (1999), where it said:

> [Section] 29 distinguishes between the continuation of an activity mandated in 1978 and the imposition of a new activity or increase in the level of an activity. Section 29 prohibits the state from reducing its proportion of the necessary costs of *existing activities* while it requires the state to pay the increased necessary costs in full when it

> mandates *new activities* or mandates activities at an *increased level.* (emphasis original).

III. THE MATTERS AT ISSUE ARE "ACTIVITIES OR SERVICES" WITHIN THE MEANING OF CONST 1963, ART 9, § 29.

On page 34 of its recently filed brief, the State asserts;

> When this Court held early in the *Durant I* litigation that "education is not an activity or service required by state statute or state agency rule", *Durant v State Bd of Ed*, 424 Mich at 388, it was referring to the type of statutory provisions such as the reporting requirements at issue here.

It is submitted that this is a fundamental misreading of this Court's 1985 decision in *Durant v State Board of Education*, 424 Mich 364, 381; NW2d 662 (1985). The phrase quoted above was used by this Court to address plaintiff-taxpayers' argument that all activities and services provided by school districts that are necessary to provide a free public education, within the meaning of Const 1963, art 8, § 2, should be encompassed within Const 1963, art 9, § 29. This Court said, in that context, that it is insufficient for purposes of article 9, § 29 to simply assert that an activity or service is necessary to provide "education". To be actionable under article 9, § 29, this Court held that a Headlee obligation must find its source in a state statute or state administrative rule.

Here, the activities and services at issue are all mandated by state statutes, administrative regulations or Executive Orders. Indeed, the Single Record Student Database, which the State directly references, is specifically required by Executive Order 2000-9 and MCL 388.1694a. It is submitted that these are most certainly activities or services required by state law within the meaning of article 9, § 29.

IV. THE DOCUMENTS TO WHICH DEFENDANTS-APPELLEES NOW OBJECT ARE PROPERLY PART OF PLAINTIFFS-APPELLANTS' APPENDIX

In its recently filed brief on appeal, the State objects to several of the documents that were included in plaintiff-taxpayers' appendix. The State contends that these documents were not a part of the "record" in the proceedings below and, pursuant to MCR 7.307(A)(5), should not be part of the appendix. For the reasons that will be set forth immediately below, it is submitted that this contention is without merit.

At the outset, it should be noted that MCR 7.307(A)(5) sets forth the mandatory contents of an appellant's appendix but does not prescribe parameters for what may, permissibly, be included. Moreover, in the instant case, there was no evidentiary proceeding below so there is no record of testimonial or documentary evidence.

Finally, and, perhaps, most importantly, this Court may certainly take judicial notice of the disputed documents pursuant to MRE 201. The only documents included in the appendix which were not attachments to the pleadings below are, with one exception, court orders and pleadings that are part of the official court record in *Durant v Michigan,* 456 Mich 175; 566 NW2d 272 (1997). The only other document now in dispute was downloaded from the State of Michigan's Center for Educational Performance and Information website. It is submitted that the State's objection to the inclusion of these documents in plaintiff-taxpayers' appendix is specious.

RELIEF REQUESTED

Plaintiff-taxpayers respectfully request that this court reverse the decision of the Court of Appeals on the three issues on appeal and remand this case to the Court of Appeals for trial or other disposition on the issues raised in plaintiff-taxpayers' second amended complaint.

Respectfully submitted,

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